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# Hong & Fong (sued as a firm) v Tan Po Lin & Anor

B HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO JA-12BNCvC-2–01 OF 2021
EVROL MARIETTE PETERS JC
21 FEBRUARY 2022

C *Legal profession — Negligence — Professional negligence — Solicitors appointed by developer for sale and purchase transactions — Discovery of contra units encumbered via charge to bank — Whether solicitors also acted for purchasers — Whether solicitors acted in accordance with common conveyancing practice — Whether contra notes admissible — Whether purchasers proved claim on balance of probabilities*

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This was an appeal against the decision of the learned sessions court judge ('SCJ') in allowing the respondents' claim against the appellant for, inter alia, a sum of RM261,126.25. The respondents ('plaintiffs'), a married couple, entered into four sale and purchase agreements ('SPAs') for the purchase of four apartment units from one Goodwill Division Sdn Bhd ('Goodwill'). Each plaintiff purchased two units known as loan units and contra units. The SPAs for the loan units were dated March 2013 and March 2016 respectively; whilst the SPAs for the contra units were dated June 2013 and March 2016 respectively. The loan units were purchased by the plaintiffs respectively through a bank loan. The contra units, however, were a result of an arrangement between the second plaintiff, as the managing director of South Johor Steel Sdn Bhd ('South Johor') and Thong Moi Keong, as the managing director of Goodwill. The contra units were offered to the plaintiffs in consideration for a supply of steel from South Johor to Goodwill. The appellant ('defendant') was appointed by Goodwill for all the transactions. The plaintiffs paid legal fees to the defendant for the transactions pertaining to the loan units but not for the contra units. In September 2016, vacant possession was granted for the contra units, which were then sold by the plaintiffs to third parties. However, it was discovered that the contra units were encumbered via a charge to Sabah Development Bank Bhd ('Sabah Bank'). The plaintiffs had to eventually pay a sum of RM261,126.25 to redeem the contra units from Sabah Bank. The plaintiffs then brought an action against the defendant for professional negligence. The SCJ allowed the plaintiffs' claim and as a result thereof, the defendant filed the present appeal.

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**Held**, dismissing the appeal with costs:

(1) Since the maker of the contra notes, which were produced in its original form, had passed away, the requirements of s 73A(1) of the Evidence Act 1950 ('the Evidence Act') which dealt specifically with documentary evidence in civil cases, had been fulfilled. The sessions court was correct in marking the contra notes as exhibits and admitting them under s 73A of the Evidence Act (see paras 8–9).

(2) Although there was no express retainer, a solicitor-client relationship may be implied from the conduct of the parties and the circumstances of the case. There were two admissions made by the defendant that they were indeed acting for plaintiffs for the contra units. It was trite law that an admission was admissible under ss 17, 18 and 21 of the Evidence Act, and was a strong piece of evidence in support of the plaintiffs' claim (see paras 12 & 14–16).

(3) In addition to the admissions, the circumstances, including the defendant's conduct were also indicative that it had, in fact, acted for the plaintiffs in relation to the contra units. Although s 84 of the Legal Profession Act 1976 stipulates that an advocate and solicitor acting for the developer should not act for the purchaser in a housing development, in the present case, the defendant was the sole solicitor in the preparation of the SPAs for the contra units, and in accordance with common conveyancing practice, the defendant should have informed the plaintiffs that it was, as alleged, acting only on behalf of Goodwill, but it never did. Since the terms of the loan units were identical to the contra units and the defendant had acted accordingly with regard to the loan units, there was no reason for the defendant to have omitted to carry out its duties in relation to the contra units, as reasonable advocates and solicitors would have done. Furthermore, if the defendant had not acted for the plaintiffs in relation to the contra units, it then begged the question of why it had advised the plaintiffs to lodge a private caveat on one of the contra units. As such, it was beyond doubt that the defendant was acting as solicitors for the plaintiffs in relation to both the loan and contra units (see paras 17–19).

(4) The issue of the standard of care of the defendant was not put to the plaintiffs' witnesses during cross-examination. It was trite law that a litigant's case must be expressly put to his opponent's witnesses during cross-examination, failing which, this would disentitle the defendant from raising such argument. Since this point was never raised at the sessions court, it would be disingenuous for the defendant to raise it at this stage. The present case involved an uncomplicated matter. According to usual and standard conveyancing practice, all that the defendant had to do was to conduct the necessary investigation as to whether the contra units were still encumbered at the time of the delivery of the vacant possession in accordance with the SPAs for the contra units; and

subsequently, to advise the plaintiffs regarding the redemption sum of a total sum of RM261,126.25 which was to be paid to Sabah Bank. That was exactly what the defendant had done with regard to the loan units. There was, therefore, no excuse for the defendant's failure to act accordingly with regard to the contra units (see paras 21–22 & 28–29).

(5) Although it was the plaintiffs who had to prove their case on a balance of probabilities, this did not mean that the defendant could escape liability by not adducing any evidence whatsoever. The defendant had the evidential burden to raise sufficient evidence. Since the threshold that the plaintiffs had to reach was a balance of probabilities, this meant that the defendant had to at least ensure that the probabilities were equal. However, the only witness that the defendant had adduced was SD1, whose evidence was not sufficient for the defendant to ensure that the probabilities were equal. In the final analysis, by not calling witnesses who could have assisted the defendant in its averments, the defendant had run the risk of having failed to discharge its evidential burden to ensure that the probabilities were at least equal. The plaintiffs had, in fact, tipped the scales in their favour, and as such, had proved their claim on a balance of probabilities (see paras 38–39).

**[Bahasa Malaysia summary**

Ini adalah rayuan terhadap keputusan hakim mahkamah sesyen yang bijaksana ('HMS') yang membenarkan tuntutan responden terhadap perayu untuk, antara lain, sejumlah RM261,126.25. Responden ('plaintif'), pasangan suami isteri, memasuki empat perjanjian jual beli ('SPA') bagi pembelian empat unit pangsapuri daripada satu Goodwill Division Sdn Bhd ('Goodwill'). Setiap plaintif membeli dua unit yang dikenali sebagai unit pinjaman dan unit kontra. SPA bagi unit pinjaman masing-masing bertarikh Mac 2013 dan Mac 2016; manakala SPA bagi unit kontra masing-masing bertarikh Jun 2013 dan Mac 2016. Unit pinjaman telah dibeli oleh plaintif masing-masing melalui pinjaman bank. Unit kontra, bagaimanapun, adalah hasil perjanjian antara plaintif kedua, sebagai pengarah urusan South Johor Steel Sdn Bhd ('South Johor') dan Thong Moi Keong, sebagai pengarah urusan Goodwill. Unit kontra telah ditawarkan kepada plaintif sebagai balasan untuk pembekalan keluli dari South Johor kepada Goodwill. Perayu ('defendan') telah dilantik oleh Goodwill untuk semua transaksi. Plaintif membayar fi guaman kepada defendan untuk transaksi yang berkaitan dengan unit pinjaman tetapi bukan untuk unit kontra. Pada September 2016, milikan kosong telah diberikan untuk unit kontra, yang kemudiannya dijual oleh plaintif kepada pihak ketiga. Bagaimanapun, ianya telah didapati bahawa unit kontra terdapat bebanan gadaian kepada Sabah Development Bank Bhd ('Bank Sabah'). Plaintif akhirnya terpaksa membayar sejumlah RM261,126.25 untuk menebus unit kontra daripada Bank Sabah. Plaintif kemudiannya membawa tindakan terhadap defendan kerana kecuaian profesional. HMS membenarkan tuntutan

plaintif dan lanjutan itu, defendan memfailkan rayuan semasa. A

**Diputuskan**, menolak rayuan dengan kos:

(1) Memandangkan pembuat nota kontra, yang dihasilkan dalam bentuk asalnya, telah meninggal dunia, keperluan s 73A(1) Akta Keterangan 1950 ('Akta Keterangan') yang menyatakan secara khusus bukti dokumentari dalam kes sivil, telah dipenuhi. Mahkamah sesyen adalah betul dalam menandakan nota kontra sebagai ekshibit dan mengakuinya di bawah s 73A Akta Keterangan (lihat perenggan 8–9). B

(2) Walaupun tidak ada lantikan yang nyata, hubungan peguamcara-klien mungkin tersirat daripada kelakuan pihak-pihak dan keadaan kes. Terdapat dua pengakuan yang dibuat oleh defendan bahawa mereka memang bertindak untuk plaintif bagi unit kontra. Sudah menjadi undang-undang mantap bahawa pengakuan boleh diterima di bawah ss 17, 18 dan 21 Akta Keterangan, dan merupakan bukti kukuh yang menyokong tuntutan plaintif. (lihat perenggan 12 & 14–16). C D

(3) Sebagai tambahan kepada pengakuan, keadaan, termasuk kelakuan defendan juga menunjukkan bahawa ia sebenarnya telah bertindak untuk plaintif berhubung dengan unit kontra. Walaupun s 84 Akta Profesion Undang-undang 1976 menetapkan bahawa seorang peguambela dan peguamcara yang bertindak untuk pemaju tidak sepatutnya bertindak untuk pembeli dalam pembangunan perumahan, dalam kes ini, defendan adalah peguamcara tunggal dalam penyediaan SPA untuk unit kontra, dan mengikut amalan pindah hak biasa, defendan sepatutnya memberitahu plaintif bahawa ia, seperti yang didakwa, bertindak hanya bagi pihak Goodwill, tetapi ia tidak pernah melakukannya. Memandangkan terma unit pinjaman adalah sama dengan unit kontra dan defendan telah bertindak sewajarnya berkenaan dengan unit pinjaman, tidak ada sebab untuk defendan telah meninggalkan dalam menjalankan tugasnya berhubung dengan unit kontra, sebagaimana yang munasabah oleh peguam bela dan peguam cara akan lakukan. Tambahan pula, jika defendan tidak bertindak untuk plaintif berhubung dengan unit kontra, ia kemudiannya menimbulkan persoalan mengapa ia telah menasihati plaintif untuk memasukkan kaveat persendirian pada salah satu unit kontra. Oleh yang demikian, tidak dapat dinafikan bahawa defendan bertindak sebagai peguamcara untuk plaintif berhubung dengan kedua-dua unit pinjaman dan kontra (lihat perenggan 17–19). E F G H

(4) Isu standard penjagaan defendan tidak dikemukakan kepada saksi plaintif semasa pemeriksaan balas. Ia adalah menjadi undang-undang yang mantap bahawa kes seorang litigasi mesti dikemukakan secara jelas kepada saksi lawannya semasa pemeriksaan balas, jika gagal, ini akan menyebabkan defendan tidak berhak untuk mengemukakan hujah I

sedemikian. Memandangkan perkara ini tidak pernah dibangkitkan di mahkamah sesyen, adalah tidak jujur untuk defendan membangkitkannya pada peringkat ini. Kes ini melibatkan perkara yang tidak rumit. Mengikut amalan pindah hak biasa dan standard, apa yang perlu dilakukan oleh defendan adalah menjalankan siasatan yang diperlukan sama ada unit kontra masih dibebani pada masa penyerahan milikan kosong mengikut SPA untuk unit kontra; dan seterusnya, untuk menasihati plaintif mengenai jumlah penebusan sejumlah RM261,126.25 yang akan dibayar kepada Bank Sabah. Itulah yang telah dilakukan oleh defendan berkenaan dengan unit pinjaman. Oleh itu, tiada alasan untuk kegagalan defendan untuk bertindak sewajarnya berkenaan dengan unit kontra (lihat perenggan 21–22 & 28–29).

(5) Walaupun plaintif-plaintif yang perlu membuktikan kes mereka atas imbangan kebarangkalian, ini tidak bermakna defendan boleh terlepas daripada liabiliti dengan tidak mengemukakan sebarang keterangan sama sekali. Defendan mempunyai beban keterangan untuk mengemukakan keterangan yang mencukupi. Memandangkan ambang yang perlu dicapai oleh plaintif adalah imbangan kebarangkalian, ini bermakna defendan perlu sekurang-kurangnya memastikan bahawa kebarangkalian adalah sama. Bagaimanapun, satu-satunya saksi yang dikemukakan oleh defendan adalah SD1, yang keterangannya tidak mencukupi untuk defendan memastikan kebarangkalian adalah sama. Dalam analisis akhir, dengan tidak memanggil saksi yang boleh membantu defendan dalam penegasannya, defendan telah menghadapi risiko gagal menunaikan beban keterangannya untuk memastikan bahawa kebarangkalian adalah sekurang-kurangnya sama. Plaintif telah, pada hakikatnya, memihak kepada mereka, dan oleh itu, telah membuktikan tuntutan mereka pada imbangan kebarangkalian (lihat perenggan 38–39).]

**Cases referred to**

*Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770, CA (refd)

*B (Children), Re* [2008] 4 All ER 1; [2008] UKHL 35, HL (refd)

*Hijau Biru Envirotech Sdn Bhd v Tetuan Dzahara & Associates (sued as a firm) & Ors* [2020] 5 MLJ 549, CA (refd)

*Hong Yik Trading v Liziz Plantation Sdn Bhd* [2017] 5 MLJ 398; [2017] 8 CLJ 491, FC (refd)

*Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1, FC (refd)

*Kam Pau Siong & Anor v Wilayah Fabrication Sdn Bhd & Ors* [2004] 3 MLJ 599, CA (folld)

*Koh Siew Keng (P) & Anor v Koh Heng Jin* [2008] 3 MLJ 822; [2008] 3 CLJ 450, CA (refd)
*MGI Securities Sdn Bhd v Teong Teck Leng & Ors* [2000] 1 MLJ 354, HC (refd)
*Maheswari a/p Eliathamby & Anor v Koperasi Serbaguna Kebangsaan Bhd & Ors* [2019] 1 MLJ 440, CA (refd)
*Miller v Minister of Pensions* [1947] 2 All ER 372, KBD (refd)
*Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor* [2020] 4 MLJ 380, CA (refd)
*R v Turner* [1975] 1 All ER 70, CA (refd)
*Shearn Delamore & Co v Sadacharamani a/l Govindasamy* [2017] 1 MLJ 486, CA (distd)
*Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* [2017] 4 MLJ 207, CA (distd)
*Toh Fong Cheng & Ors v Pang Choon Kiat & Ors and another appeal* [2020] MLJU 1476; [2020] 1 LNS 2123, CA (refd)
*U Television Sdn Bhd & Anor v Comintel Sdn Bhd* [2017] 5 MLJ 292; [2017] 10 CLJ 580, FC (folld)
*Unsung bin Rasad v PP* [2019] 4 MLJ 448; [2019] 1 LNS 662, CA (refd)
*Victor Cham & Anor v Loh Bee Tuan* [2006] 5 MLJ 359, CA (refd)
*Wong Swee Chin v PP* [1981] 1 MLJ 212; [1980] 1 LNS 138, FC (folld)
*Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175; [1971] 1 LNS 151, FC (refd)
*Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39; [1984] 1 CLJ Rep 251, FC (refd)

**Legislation referred to**

Evidence Act 1950 ss 17, 18, 21, 73A, 73A(1), 101, 102, 114(g)
Legal Profession Act 1976 s 84
Rules of Court 2012 O 40A r 2(1)

*Loh Chu Bian (with Lee Wei Ting and Yong Veng Loc) (Loh Ivan & Lee Hui) for the appellant.*
*Tan Jee Tjun (with Michelle Chew Ai Phin) (Thomas Philip) for the respondent.*

**Evrol Mariette Peters JC:**

INTRODUCTION

**[1]** This was an appeal against the decision of the learned sessions court judge ('SCJ') delivered on 21 January 2021, in allowing the respondents' claim against the appellant for, inter alia, a sum of RM261,126.25. For ease of reference, the appellant and respondents will be referred to respectively as the defendant and plaintiffs.

A THE FACTUAL BACKGROUND

**[2]** The plaintiffs, a married couple, entered into four sale and purchase agreements ('SPAs') for the purchase of four apartment units from one Goodwill Division Sdn Bhd ('Goodwill'). Each plaintiff purchased two units
B known as loan units and contra units. The SPAs for the loan units were dated March 2013 and March 2016 respectively; whilst the SPAs for the contra units were dated June 2013 and March 2016 respectively.

**[3]** The loan units were purchased by the plaintiffs respectively through a
C bank loan. The contra units, however, were a result of an arrangement between the second plaintiff, as the managing director of South Johor Steel Sdn Bhd ('South Johor') and Thong Moi Keong, as the managing director of Goodwill. The contra units were offered to the plaintiffs in consideration for supply of steel from South Johor to Goodwill.
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**[4]** The defendant was appointed by Goodwill for all the transactions. The plaintiffs paid legal fees to the defendant for the transactions pertaining to the loan units but not for the contra units.

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**[5]** In September 2016, vacant possession was granted for the contra units, which were then sold by the plaintiffs to third parties. However, it was discovered that the contra units were encumbered via a charge to Sabah Development Bank Bhd ('Sabah Bank'). The plaintiffs had to eventually pay a
F sum of RM261,126.25 to redeem the contra units from Sabah Bank.

**[6]** The plaintiffs brought an action against the defendant for professional negligence. The learned SCJ allowed the plaintiffs' claim and as a result thereof, the defendant appealed to this court ('this appeal'). This appeal was dismissed
G for the following reasons.

CONTENTIONS, EVALUATION AND FINDINGS

*Whether the contra notes were admissible*

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**[7]** At the sessions court, the defendant had challenged the contra notes which were relied upon by the plaintiffs to prove their claim. The challenge was mounted on the basis that the contra notes were approved by Thong Moi Keong, who had since passed away.

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**[8]** At this juncture, it is important to bear in mind that the learned SCJ had considered s 73A(1) of the Evidence Act 1950 ('the Evidence Act'), which deals specifically with documentary evidence in civil cases. The provision reads:

Section 73A — Admissibility of documentary evidence in civil cases, etc.

(1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, *on production of the original document*, be admissible as evidence of that fact if the following conditions are satisfied:

(a) if the maker of the statement either —

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

*Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead*, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success. (Emphasis added.)

**[9]** Since the maker of the contra notes, which were produced in its original form, had passed away, the requirements of s 73A(1) of the Evidence Act had been fulfilled, and as such, the learned SCJ was correct in marking the contra notes as exhibits and admitting them under s 73A of the Evidence Act 1950.

*Whether the defendant was common solicitors*

**[10]** The whole slant of the defence was that the defendant was not the solicitors for the plaintiffs in relation to the contra units, as the defendant firm was never appointed to act for them. This was the defendant's emphasis at the sessions court.

**[11]** The defendant submitted that it was not retained to act as the solicitors for the plaintiffs in respect of the contra units, on the grounds that there was no express written or oral retainer, and that no payments were made by the plaintiffs in respect of the defendant's fees pertaining to the contra units. The defendant had also submitted that it had never advised, nor had communicated with the plaintiffs with regard to the contra units.

**[12]** Although there was no express retainer, a solicitor-client relationship may be implied from the conduct of the parties and the circumstances of the case. This was explained in several cases including *Victor Cham & Anor v Loh*

*Bee Tuan* [2006] 5 MLJ 359 and *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39; [1984] 1 CLJ Rep 251. In *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39; [1984] 1 CLJ Rep 251, it was stated by Syed Agil Barakbah FJ in the following passages:

> In our view, there was ample evidence on record for the learned judge to conclude that a retainer came into existence by implication and as amplified by the c*onduct of the parties which showed a course of dealings giving rise to legal obligations and establishing the relationship of solicitor and client.* (*Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1978] 3 All ER 571). (Emphasis added.)

**[13]** With regard to the present case, the plaintiffs had not paid the defendant's legal fees with regard to the transaction for the contra units. This, the plaintiffs explained, was due to the fact that the contra units were purchased via a contra transaction, and as such, it was reasonable to expect Goodwill to have handled payment of the defendant's legal fees for the contra units SPAs.

**[14]** In any event, a very telling fact was that two admissions were made by the defendant regarding its role pertaining to the contra units. The first was through one Muhammad Izwan Aziz bin Md Said who had written on behalf of the defendant to the plaintiffs' solicitors, via letter dated 27 May 2019, the relevant part of, which reads (in verbatim):

> 2. We strictly deny paragraph 3, 9 and 10 of the said letter. However, *we did acted for both Developer and your clients* in respect of preparation the above Sale and Purchase Agreement. (Emphasis added.)

**[15]** It is trite law that an admission is admissible under ss 17, 18 and 21 of the Evidence Act, and is a strong piece of evidence in support of the plaintiffs' claim. Reference on this point was made to the Court of Appeal case of *Koh Siew Keng (P) & Anor v Koh Heng Jin* [2008] 3 MLJ 822; [2008] 3 CLJ 450.

**[16]** The second admission was made by the defendant's own witness, one Yap Foong Ling, a former director of Goodwill ('SD1') who, during the trial, testified that the defendant was indeed acting for the plaintiffs for the contra units.

**[17]** In addition to these admissions, the circumstances, including the defendant's conduct were also indicative that it had, in fact, acted for the plaintiffs in relation to the contra units. For instance, although s 84 of the Legal Profession Act 1976 stipulates that an advocate and solicitor acting for the developer, should not act for the purchaser in housing development, in the present case, the defendant was the sole solicitors in the preparation of the SPAs for the contra units, and in accordance with common conveyancing practice, the defendant should have informed the plaintiffs that it was, as alleged, acting only on behalf of Goodwill, but it never did. Such common conveyancing

practice was referred to in a plethora of cases including *Victor Cham & Anor v Loh Bee Tuan* [2006] 5 MLJ 359, *Toh Fong Cheng & Ors v Pang Choon Kiat & Ors and another appeal* [2020] MLJU 1476; [2020] 1 LNS 2123.

**[18]** Since the terms of the loan units were identical to the contra units, and that the defendant had acted accordingly with regard to the loan units, there was no reason for the defendant to have omitted to carry out its duties in relation to the contra units, as reasonable advocates and solicitors would have done. Furthermore, if the defendant had not acted for the plaintiffs in relation to the contra units, it then begs the question why it had advised the plaintiffs to lodge a private caveat on one of the contra units.

**[19]** As such, it was beyond doubt that the defendant was acting as solicitors for the plaintiffs in relation to both the loan and contra units.

*Whether the standard of care had been established/met*

**[20]** Although the gist of the defence was that the defendant was not the solicitors for the plaintiffs, in this appeal, however, the emphasis of the defendant was that the plaintiffs had failed to establish the standard of care imposed on the defendant and whether such standard had been met.

**[21]** First and foremost, the issue of the standard of care of the defendant was not put to the plaintiffs' witnesses during cross-examination. It is trite law that a litigant's case must be expressly put to his opponent's witnesses during cross-examination, failing which, this would disentitle the defendant from raising such argument. This principle was emphatically stated by Gopal Sri Ram JCA (as he then was), in the case of *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770, in the following passage:

> ... *It is essential that a party's case be expressly put* to his opponent's material witnesses when they are under cross-examination. *A failure in this respect may be treated as an abandonment of the pleaded case and if a party*, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well. (Emphasis added.)

**[22]** I have to, therefore, agree with the plaintiffs that since this point was never raised at the sessions court, it would be disingenuous for the defendant to raise it at this stage. In any event, in the interest of completeness I proceeded to consider this issue.

**[23]** In its submission, the defendant relied heavily on the cases of *Shearn Delamore & Co v Sadacharamani a/l Govindasamy* [2017] 1 MLJ 486 and

*Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* [2017] 4 MLJ 207, to contend that the plaintiffs had failed to call an expert to testify as to the standard of care that is expected of an advocate and solicitor, which the plaintiffs had failed to do.

**[24]** In my view, the authorities relied on by the defendant are distinguishable as it has been established by a plethora of cases including *Hijau Biru Envirotech Sdn Bhd v Tetuan Dzahara & Associates (sued as a firm) & Ors* [2020] 5 MLJ 549 and *Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor* [2020] 4 MLJ 380, that 'the failure to call an expert to testify as to the standard of care that is expected of an advocate and solicitor is not fatal in every case of professional negligence against an advocate and solicitor', and that it would depend on the facts of the individual cases. The question that needed to be addressed by the court, therefore, was whether the opinion evidence of an expert was required in the first place to assist this court.

**[25]** At this juncture, it was vital to understand the role of the expert. Pursuant to O 40A r 2(1) of the Rules of Court 2012 ('Rules of Court'), the role of the expert is merely to assist the court on matters within his expertise. The provision reads:

> Order 40A — Experts of parties
>
> Rule 2 — Expert's duty to Court
>
> (1) It is the duty of an expert *to assist the Court* on the matters within his expertise. (Emphasis added.)

**[26]** I was guided also by the following observations of Raja Azlan Shah CJ (as he then was) in *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; [1980] 1 LNS 138, on the role of the expert:

> Our system of jurisprudence does not, generally speaking, remit the determination of dispute to experts. Some questions are left to the robust good sense of a jury. Others are resolved by the conventional wisdom of a judge sitting alone. In the course of elucidating disputed questions, aids in the form of expert opinions are in appropriate cases placed before juries or judges. *But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments.* In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion. (Emphasis added.)

**[27]** The court's attention was also brought to the oft-quoted passage of Lawton LJ in the English case of *R v Turner* [1975] 1 All ER 70, which, was referred to and cited by Abang Iskandar Abang Hashim JCA (as he then was) in the Court of Appeal case of *Maheswari a/p Eliathamby & Anor v Koperasi Serbaguna Kebangsaan Bhd & Ors* [2019] 1 MLJ 440, in the following passage:

The law was emphatically stated by Lawton LJ in the English case of *R v Turner* [1975] 1 All ER 70 at p 74 where he said: 'The foundation of these rules was laid by Lord Mansfield CJ in *Folkes v Chadd* [1782] 3 Doug KB 157 at p 159 and was well laid: The opinion of scientific men upon proven facts', he said, 'may be given by men of science within their own science'. *An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary*.

This *Turner*'s case was followed in the Singapore case of *Chou Kooi Peng & Anor v Public Prosecutor* [1998] 3 SLR 593. See also the case of *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19; [1984] 1 CLJ Rep 368; [1984] 1 CLJ 80 (FC). *In essence what this means is that expert evidence is only admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of the presiding judge.* (Emphasis added.)

**[28]** In the cases relied upon by the defendant, the matters in question were not straightforward ones, and hence the assistance of experts was imperative. The present case, however, involved an uncomplicated matter. According to usual and standard conveyancing practice, all the defendant had to do was to conduct the necessary investigation as to whether the contra units were still encumbered at the time of the delivery of the vacant possession in accordance with the SPAs for the contra units; and subsequently to advise the plaintiffs regarding the redemption sum of a total sum of RM261,126.25 which has to be paid to Sabah Bank. This was pursuant to cl 2(3) of the SPAs for the contra units, which reads:

Parcel free from encumbrances before the Purchaser takes vacant possession of the said Parcel

2(3) In the event the said land shall be encumbered to any bank and/or financial institution by the Vendor, the Vendor shall immediately after the date of this Agreement deliver or cause to be delivered to the Purchaser and/or the Financier (as hereinafter defined) a copy of the redemption statement and undertaking letter issued by such bank and or financial institution in respect of the said Parcel and shall authorize the Purchaser to pay such portion of the purchase price or the Financier to release such portion of the Loan, as the case may be, equivalent to the amount of the redemption sum payable in respect of the said Parcel directly to such bank and/or financial institution and thereafter the balance purchase price or the balance Loan to the Vendor provided all such payments and releases are made progressively at the time and in the manner prescribed in the Third Schedule.

**[29]** In fact, that was exactly what the defendant had done with regard to the loan units. There was, therefore, no excuse for the defendant's failure to act accordingly with regard to the contra units.

*Whether defendant had discharged its evidential burden*

**[30]** It was undisputed that the defendant had called only one witness who was the Goodwill's former director to give evidence. As a result of which, the learned SCJ had drawn an adverse inference against the defendant. The defendant argued that there was no basis to do so bearing in mind that it was the plaintiffs who had the legal burden to prove the case on a balance of probability.

**[31]** It is trite law that the plaintiffs had the legal burden of proof, as prescribed by ss 101 and 102 of the Evidence Act 1950 ('the Evidence Act') which read:

> Section 101 — Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> Section 102 — On whom burden of proof lies
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

**[32]** Both ss 101 and 102 of the Evidence Act were referred to in *MGI Securities Sdn Bhd v Teong Teck Leng & Ors* [2000] 1 MLJ 354, by KL Rekhraj J in the following passage:

> ... ss 101 and 102 of the Evidence Act 1950 require 'whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove those facts do exist'; and here the plaintiff having chosen and elected not to lead the evidence of the oral agreements through its witnesses, the court could only hold that there was no evidence of the plaintiff's before the court to adjudicate upon; and accordingly dismissed the plaintiff's claim with costs.

**[33]** I found instructive also the Federal Court case of *U Television Sdn Bhd & Anor v Comintel Sdn Bhd* [2017] 5 MLJ 292; [2017] 10 CLJ 580, and the Court of Appeal case of *Kam Pau Siong & Anor v Wilayah Fabrication Sdn Bhd & Ors* [2004] 3 MLJ 599, on the interpretation of ss 101 and 102 of the Evidence Act.

**[34]** The reminder on who has the burden to prove was administered by the Federal Court in *Hong Yik Trading v Liziz Plantation Sdn Bhd* [2017] 5 MLJ 398; [2017] 8 CLJ 491 and *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175; [1971] 1 LNS 151, where in the latter case, it was stated by Ong CJ in the following passage:

> In a negligence action the onus of proof rests wholly on the plaintiff, whether or not the defendant gives evidence. The plaintiff cannot succeed without proof of the defendant's negligence. Evidence is the foundation of proof, with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of inquiry. Evidence, if accepted and believed, may result in proof, but it is not necessarily proof of itself.

**[35]** It was further emphasised in the case of *Hong Yik Trading v Liziz Plantation Sdn Bhd* [2017] 5 MLJ 398; [2017] 8 CLJ 491, by Arifin Zakaria CJ, in the following passage:

> It is settled law that the burden of proof rests throughout the trial on the party who asserts that the facts exist (s 101 of the Evidence Act 1950). Where a party on whom the burden of proof lies has discharged that burden, then the evidential burden shifts to the other party. However, if the party on whom the burden of proof lies fails to discharge it, the other party need not call any evidence.

**[36]** The standard of proof on the plaintiffs to prove their claim was on a balance of probabilities, a term which was described in *Miller v Minister of Pensions* [1947] 2 All ER 372 by Denning J (as he then was) as 'more probable than not' and which is 'not so high as required in a criminal case ... but if the probabilities are equal, it is not discharged'. *Miller v Minister of Pensions* has been assimilated into Malaysian jurisprudence through several cases including *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1.

**[37]** The concept of balance of probabilities was further explained in *Unsung bin Rasad v Public Prosecutor* [2019] 4 MLJ 448; [2019] 1 LNS 662, in which Abang Iskandar Abang Hashim JCA (as he then was), in adopting the English case of *Re B (Children)* [2008] 4 All ER 1; [2008] UKHL 35, stated in the following passage:

> In the celebrated case of *Miller v Minister of Pensions* [1947] 2 All ER 372, Denning J (as he then was) said:
>
> > If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.
>
> [17] That would invariably require that party involved having to lead or adduce affirmative evidence to prove his case, as the court shall presume the absence of those circumstances, *to reach a level of proof of at least 51% probability against his adverse party.* We would cite the English case of *Re B* [2008] UKHL 35, where Lord Hoffman had used a mathematical analogy to illustrate what needed to be proven by a party desirous of having judgement entered in his favour, like so:
>
> > If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the

doubt is resolved by a rule that one party or the other carries the burden of proof. *If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.* (Emphasis added.)

**[38]** Although it was the plaintiffs who had to prove their case on a balance of probabilities, this did not mean that the defendant could escape liability by not adducing any evidence whatsoever. The defendant had the evidential burden to raise sufficient evidence. Since the threshold that the plaintiffs had to reach was a balance of probabilities, this meant that the defendant had to at least ensure that the probabilities were equal. However, the only witness that the defendant had adduced was SD1, whose evidence was not sufficient for the defendant to ensure that the probabilities were equal. Therefore, even if I agreed with the defendant that s 114(g) of the Evidence Act should not have been invoked, in the final analysis, by not calling witnesses who could have assisted the defendant in its averments, the defendant had run the risk of having failed to discharge its evidential burden to ensure that the probabilities were at least equal.

**[39]** In the final analysis and on the totality of the evidence, the plaintiffs had, in fact, tipped the scales in their favour, and as such, had proved their claim on a balance of probabilities.

CONCLUSION

**[40]** In the upshot, therefore, based on the aforesaid reasons, and after careful scrutiny and judicious consideration of all the evidence before this court, including the written and oral submissions of both parties, and the grounds of judgment of the learned SCJ, I found no error in the decision of the learned SCJ which warranted interference. Hence, this appeal was dismissed with costs.

*Appeal dismissed with costs.*

Reported by K Selvaraju